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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

JANICE M. OHMAN, Plaintiff and Appellant, v. CITY OF TUSTIN et al., Defendants and Respondents.	G042134 (Super. Ct. No. 30-2008-00102342) O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, William M. Monroe, Judge. Affirmed.

Law Offices of Leo James Terrell and Leo James Terrell for Plaintiff and Appellant.

Woodruff, Spradlin & Smart and M. Lois Bobak for Defendants and Respondents.

* * *

INTRODUCTION

Following the termination of plaintiff Janice M. Ohman's employment with the City of Tustin's (the City) police department, the City's manager who upheld the decision to terminate plaintiff's employment, complained that he had received over 100 unsolicited magazines and products at his workplace and residence. One of plaintiff's former supervisors recognized plaintiff's handwriting on an allegedly forged subscription form. In investigating the City manager's complaint, detective Gentry Mayfield of the City's police department asked one of the City's employees in the human resources department for documents containing examples of plaintiff's signature. The City provided Mayfield with 28 pages of documents which Mayfield turned over to a handwriting expert and the district attorney's office.

Plaintiff sued the City and Mayfield (collectively, defendants) for invasion of privacy based on both the federal and state Constitutions, negligence, and violation of the physician-patient privilege; all of plaintiff's claims were based on the allegation defendants wrongfully disclosed confidential information contained in her personnel file. The trial court granted defendants' motion for summary judgment on the ground the alleged confidential information underlying plaintiff's claims had been previously disclosed by plaintiff.

We affirm. The undisputed facts show the information plaintiff contends was improperly disclosed to Mayfield by the City and by Mayfield to the handwriting expert and district attorney's office had been previously and publicly disclosed by plaintiff throughout various stages of litigation she had pursued in challenging the termination of her employment. As such information was no longer private or otherwise confidential, plaintiff was unable to establish any of her claims. The trial court therefore properly granted summary judgment in favor of defendants.

SUMMARY OF UNDISPUTED MATERIAL FACTS[1]

I.
PLAINTIFF'S EMPLOYMENT WITH THE CITY IS TERMINATED; PLAINTIFF CHALLENGES THE TERMINATION OF HER EMPLOYMENT.

Plaintiff began her employment with the City as a civilian records clerk in the City's police department in 1978. In September 2002, plaintiff did not return to work for the City, as scheduled, following knee replacement surgery. Instead, the City received several reports from plaintiff's physicians, which stated she could not return to work until November 2002 and vaguely referred to a back condition. The reports further stated that when released to return to work, she would be released with no restrictions except that she would require a reduced work schedule. Starting in November 2002, the City permitted plaintiff to remain on a leave of absence as it attempted to obtain information from her and her physician necessary to determine whether she was physically disabled within the meaning of the Fair Employment and Housing Act (Govt. Code, § 12900 et seq.), and how any such disability could be accommodated. The City was never provided this information and plaintiff's employment was terminated effective August 7, 2003.

Plaintiff sought administrative review of the decision to terminate her employment. Following an evidentiary hearing, the City's manager, William Huston, upheld the termination decision.

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[1] The summary is based on undisputed evidence presented in the moving papers and in opposition to the motions for summary judgment. Although the parties objected to evidence presented in support of and in opposition to the motions on a variety of grounds, the appellate record does not show the parties obtained rulings on those objections. "Because counsel failed to obtain rulings, the objections are waived and are not preserved for appeal. [Citations.] Although many of the objections appear meritorious, for purposes of this appeal we must view the objectionable evidence as having been admitted in evidence and therefore as part of the record." (*Ann M. v. Pacific Plaza Shopping Center* (1993) 6 Cal.4th 666, 670, fn. 1.)

In March 2005, plaintiff filed a petition for writ of administrative mandate which challenged Huston's determination and argued the City had failed to reasonably accommodate her alleged medical conditions. She lodged the administrative record in the trial court which included documents containing information about her medical conditions, her return to work plans, and her work restrictions.

In February 2006, the trial court denied plaintiff's petition and in March 2006, plaintiff appealed. The record on appeal included the administrative record. In a decision filed in June 2007, we affirmed the trial court's denial of plaintiff's petition for writ of administrative mandate holding, "[s]ubstantial evidence showed [plaintiff] failed to provide the City with sufficient information demonstrating that she was physically disabled within the meaning of [the Fair Employment and Housing Act]." (*Ohman v. City of Tustin* (June 6, 2007, G036850) [nonpub. opn.].)

II.

HUSTON REPORTS HIS RECEIPT OF LARGE AMOUNTS OF UNSOLICITED MAGAZINES AND PRODUCTS; MAYFIELD INVESTIGATES HUSTON'S COMPLAINT.

In January 2006, Huston reported to the police department that he had received, both at home and at work, over 100 books, magazines, and other materials that neither he nor his wife had ordered or requested. Mayfield, who at the time was a detective in the City's police department, conducted a criminal investigation whether Huston's name had been forged on subscription forms. He interviewed Huston, who provided Mayfield with several magazine subscription cards and order forms that contained Huston's forged signature. Plaintiff's former supervisor, Scottie Frazier, said she recognized the handwriting on the forms as belonging to plaintiff. In reviewing whether any employees of the City might have had a grudge against him and might be behind the forged subscriptions and other mail, Huston remembered that plaintiff had been involved in litigation against the City and he had upheld the decision to terminate plaintiff's employment.

Mayfield contacted Margaret Dowling, who was employed in the City's human resources department, and asked her if he could look at "non-personnel documents" pertaining to plaintiff to obtain samples of plaintiff's handwriting. Mayfield obtained a total of 28 pages of documents from the City, which included exemplars of plaintiff's handwriting.[2] Mayfield did not present the City with a subpoena before obtaining these documents.

Mayfield compared the documents he obtained from the City with the writing on the subscription forms provided by Huston; Mayfield submitted both sets of documents to a document forensic examiner employed by the Orange County crime laboratory to conduct a forensic analysis.

Plaintiff was charged with several felony counts of forgery in violation of Penal Code section 470, subdivision (d). After the trial court ruled the evidence of plaintiff's handwriting that had been taken from her personnel file was inadmissible because it had been obtained without a warrant, all counts were dismissed for lack of evidence.

PROCEDURAL BACKGROUND

Plaintiff's first amended complaint alleged the following four causes of action against defendants: (1) violation of the right to privacy under the Fourth and Fourteenth Amendments to the United States Constitution; (2) violation of the right to privacy under article I, section 1 of the California Constitution; (3) violation of the physician-patient privilege; and (4) negligence. The first amended complaint alleged the City wrongfully disclosed to Mayfield "confidential personnel information, official information and medical information" and that such information was wrongfully disclosed to the district attorney's office.

[2] At her deposition, plaintiff stipulated that those 28 pages of documents constituted "the entire universe of documents that the Plaintiff is alleging were wrongfully disclosed by the City of Tustin and Detective Mayfield in this case."

Defendants and plaintiff each filed a motion for summary judgment or, in the alternative, summary adjudication. The trial court granted defendants' motion on grounds, inter alia, "either some of the subject personnel file documents had been previously disclosed in public proceedings or the contents of the subject documents had been disclosed in those prior public proceedings. Therefore, the documents or their contents were no longer private at the time detective Mayfield obtained them from the city." The trial court denied plaintiff's motion for summary judgment as moot.

Judgment was entered in defendants' favor. Plaintiff appealed.[3]

DISCUSSION

I.
STANDARD OF REVIEW AND BURDENS OF PROOF

"A trial court properly grants summary judgment where no triable issue of material fact exists and the moving party is entitled to judgment as a matter of law. [Citation.] We review the trial court's decision de novo, considering all of the evidence the parties offered in connection with the motion (except that which the court properly excluded) and the uncontradicted inferences the evidence reasonably supports. [Citation.]" (*Merrill v. Navegar, Inc.* (2001) 26 Cal.4th 465, 476.)

Section 437c, subdivision (p)(2) of the Code of Civil Procedure provides that for purposes of motions for summary judgment and summary adjudication: "A defendant or cross-defendant has met his or her burden of showing that a cause of action has no merit if that party has shown that one or more elements of the cause of action, even if not separately pleaded, cannot be established, or that there is a complete defense

[3] Plaintiff amended her notice of appeal to clarify that she sought appellate review not only of the trial court's order granting defendants' summary judgment motion, but also of the court's denial of her summary judgment motion. Plaintiff has since abandoned her challenge to the trial court's denial of her summary judgment as she does not include any argument on the subject in her appellate briefs.

to that cause of action. Once the defendant or cross-defendant has met that burden, the burden shifts to the plaintiff or cross-complainant to show that a triable issue of one or more material facts exists as to that cause of action or a defense thereto. The plaintiff or cross-complainant may not rely upon the mere allegations or denials of its pleadings to show that a triable issue of material fact exists but, instead, shall set forth the specific facts showing that a triable issue of material fact exists as to that cause of action or a defense thereto."

II.
PLAINTIFF'S PRIVACY CLAIMS FAIL BECAUSE PLAINTIFF PUBLICLY DISCLOSED THE ALLEGED CONFIDENTIAL INFORMATION.

Plaintiff contends the trial court erred by granting summary judgment as to her invasion of privacy claims under the Fourth and Fourteenth Amendments to the United States Constitution and article 1, section 1 of the California Constitution. As we discuss in detail *post*, under either the federal or California Constitution, plaintiff's invasion of privacy claim fails because it is premised on the disclosure of information that had previously been publicly disclosed by plaintiff.

A.
Invasion of Privacy Claim Under the Fourth and Fourteenth Amendments

The Fourth Amendment protects "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." The Fourteenth Amendment extends this guarantee to searches and seizures by state officials. (*Mapp v. Ohio* (1961) 367 U.S. 643, 655.)

"The Fourth Amendment's search and seizure clause is sometimes referred to as a 'privacy' provision. [Citation.] The Fourth Amendment does not proscribe all searches and seizures, but only those that are unreasonable. [Citation.] Under the Fourth Amendment and the parallel search and seizure clause of the California Constitution (art. I, § 13), the reasonableness of particular searches and seizures is determined by a general balancing test 'weighing the gravity of the governmental interest or public concern served

and the degree to which the [challenged government conduct] advances that concern against the intrusiveness of the interference with individual liberty.' [Citation.] [¶] Collectively, the federal cases 'sometimes characterized as protecting "privacy" have in fact involved at least two different kinds of interests. One is the individual interest in avoiding disclosure of personal matters, and another is the interest in independence in making certain kinds of important decisions.'" (*Hill v. National Collegiate Athletic Assn.* (1994) 7 Cal.4th 1, 29-30, fn. omitted (*Hill*).)

Plaintiff's federal privacy claim falls within the former category described in *Hill, supra,* 7 Cal.4th at page 30—violation of the right to avoid the disclosure of personal matters. "What a person knowingly exposes to the public, even in his own home or office," however, "is not a subject of Fourth Amendment protection." (*Katz v. United States* (1967) 389 U.S. 347, 351.)

B.

Invasion of Privacy Claim Under the California Constitution

The California Constitution provides at article I, section 1: "All people are by nature free and independent and have inalienable rights. Among these are enjoying and defending life and liberty, acquiring, possessing, and protecting property, and pursuing and obtaining safety, happiness, and privacy." Citing its seminal decision in *Hill, supra,* 7 Cal.4th 1, the California Supreme Court, in *Hernandez v. Hillsides, Inc.* (2009) 47 Cal.4th 272, 287, reiterated the following legal principles defining a claim for invasion of privacy under the California Constitution: "The right to privacy in the California Constitution sets standards similar to the common law tort of intrusion. [Citation.] Under this provision, which creates at least a limited right of action against both private and government entities [citation], the plaintiff must meet several requirements. [¶] First, he must possess a legally protected privacy interest. [Citation.] These interests include 'conducting personal activities without observation, intrusion, or interference' [citation], as determined by 'established social norms' derived from such

sources as the 'common law' and 'statutory enactment' [citation]. Second, the plaintiff's expectations of privacy must be reasonable. This element rests on an examination of 'customs, practices, and physical settings surrounding particular activities' [citation], as well as the opportunity to be notified in advance and consent to the intrusion. [Citation.] Third, the plaintiff must show that the intrusion is so serious in 'nature, scope, and actual or potential impact [as] to constitute an egregious breach of the social norms.' [Citations.]" (Fn. omitted.)

The California Supreme Court explained that the privacy protection contained in article I, section 1 of the California Constitution "is no broader in the area of search and seizure than the 'privacy' protected by the Fourth Amendment." (*Hill, supra,* 7 Cal.4th at p. 30, fn. 9.) As is the case with the federal constitutional violation of privacy claim, the privacy claim under the state Constitution cannot be based on information plaintiff had already disclosed. (See, e.g., *Leibert v. Transworld Systems, Inc.* (1995) 32 Cal.App.4th 1693, 1702 [affirming dismissal of claim alleging violation of state constitutional right to privacy, appellate court held that because the plaintiff admitted his sexual orientation was not confidential, "as a matter of law," the plaintiff "cannot state a claim for infringement of a legally protected *informational* privacy interest"].)

C.

Plaintiff's Privacy Claims Fail Because Those Portions of Her Personnel File She Contends Were Wrongfully Disclosed by Defendants Had Previously Been Publicly Disclosed by Plaintiff.

Here, plaintiff's constitutional privacy claims were based on the disclosure of certain portions of her personnel file. The undisputed facts show, however, that the subject information had already been disclosed by plaintiff.

At plaintiff's deposition, her counsel stipulated that 28 pages of documents, which were marked and included as part of exhibit 2 to her deposition (exhibit 2), constituted "the entire universe of documents that the Plaintiff is alleging were

wrongfully disclosed" by defendants. After plaintiff's counsel entered this stipulation, defendant's counsel asked plaintiff: "[D]o you understand that your attorney and I have entered into a stipulation, meaning that we've agreed, that these documents that are marked as Exhibit 2, these are all the documents that you're contending in your lawsuit were turned over or disclosed by the City of Tustin and Detective Mayfield?" Plaintiff responded, "[y]es, I believe so."

Defendant's counsel asked plaintiff to go through the 28 pages of documents contained in exhibit 2 and show him all of the medical information she contended defendants had wrongfully disclosed. Plaintiff identified only five documents in exhibit 2 that contained such information. Two of the five identified documents were previously made public by plaintiff when she challenged the City's decision to terminate her employment and included them in the administrative record prepared in connection with those proceedings. The first document consisted of a handwritten note from plaintiff to her former supervisor, Mary Novotny, dated December 18, 2002, which addressed plaintiff's work restrictions due to her back injury and stated: "Dr. Danto has released me back to work 4 days a week 8 hours a day. This restriction is the same as the one when he released me back to work on 11/6/02. Arlene Marks wants further information as to the City's ability to make the accom[m]odation. Dr. Danto does not know what else he can provide." The second document that was included in the administrative record consisted of a typewritten "memo," dated July 2, 2003, from plaintiff to Arlene Marks in the City's human resources department, which stated in part: "I saw Dr. Danto on Monday, June 30, 2003. I will be able to return to work 12 hour days on August 15, 2003. Please see attached progress report dated June 30, 2003 and the report sent to Ms. Manjit Singh dated May 30, 2003." As it is undisputed plaintiff publicly disclosed both of those documents by including them in the administrative record, neither the documents nor their contents can support plaintiff's invasion of privacy claims.

We therefore turn to the three other documents contained in exhibit 2 to determine if a triable issue of material fact exists as to whether they contain confidential information that might support plaintiff's constitutional privacy claims. The first of the three documents consists of the last page of an onsite job analysis dated March 9, 1998, in which plaintiff made the following typewritten comments: "I have difficulty getting up from a seated position and it is always painful. I push myself up with my arms. [¶] I am unable [to] stand or walk for over 5 to 10 minutes without pain. [¶] I am unable to walk up and down stairs. [¶] I am unable to stoop down or squat." Although the administrative record did not contain this exact document, it does contain similar information. The administrative record contained a report, dated May 30, 2003, showing that plaintiff's work restrictions included limited squatting, kneeling, twisting, stair climbing, bending, pushing, pulling, and reaching. It also stated she was limited to lifting 10 pounds to waist height. The administrative record also suggested that plaintiff had previously suffered constant pain by stating she had "'significant improvement[;] pain not constant.'" Furthermore, the document did not constitute a physician's report or other medical record; rather, the document included plaintiff's comments regarding her physical challenges.

The second of those three documents is a disability claim form in which plaintiff handwrote: "Knee-injury occurred @ 10 years ago—total knee replacement scheduled for June 24, 2002." Although that document was also not included in the administrative record, the information contained within it was in the record. The administrative record contained a disability certificate, dated June 10, 2002, stating plaintiff had "Traumatic Anthropathy lower leg," and that she was scheduled for surgery on June 24, 2002. The administrative record also contained information that plaintiff had received approval from the City's workers' compensation attorney to have knee replacement surgery and that plaintiff's leave of absence began June 6, 2002.

The final document containing allegedly wrongfully disclosed medical information is a disability claim form which plaintiff contends includes the confidential information that she took disability leave in February 8, 2000 for depression. The undisputed facts show plaintiff had disclosed her depression when she filed a workers' compensation claim for, inter alia, injury to her "psyche." In connection with a proceeding before the Workers' Compensation Appeals Board, plaintiff testified in a 2001 deposition that she was being treated for depression. In the instant case, plaintiff testified in her deposition that the document's reference to her job duties as consisting entirely of computer scanning indirectly referenced her depression. This brief reference to her job duties does not reveal any confidential medical information and the disclosure of this brief description of plaintiff's duties as of the time of her disability cannot support her claims for violation of constitutional privacy rights.

Having confirmed that the five documents, discussed *ante*, contained all the confidential medical information plaintiff contended was wrongfully disclosed by defendants, at her deposition, defendants' counsel asked her: "Other than the medical information that we just spoke about, is there any other information in Exhibit 2 that you believe was wrongfully disclosed by either the City of Tustin or Gentry Mayfield?" Plaintiff responded, "[n]o." Defendants' counsel asked, "[s]o it's just the medical information?" Plaintiff nodded affirmatively. Defendants' counsel further asked: "So I just want to make sure I'm clear on this. [¶] The entire universe of wrongfully disclosed information would be medical information about your back injury, medical information about your knee injury, and medical information about your depression; is that correct?" After plaintiff's counsel objected to the question on the ground it called for speculation,[4]

[4] As discussed *ante*, plaintiff's counsel did not obtain a ruling on this objection and it is therefore waived. (*Ann M. v. Pacific Plaza Shopping Center, supra*, 6 Cal.4th at p. 670, fn. 1 ["[b]ecause counsel failed to obtain rulings, the objections are waived and are not preserved for appeal"].)

at defendants' counsel's request, the court reporter reread the question. Before plaintiff could answer, defendants' counsel added, "[a]nd that would be the information about those three medical conditions that we just discussed in Exhibit 2; is that correct?" Plaintiff responded, "[y]es."

Because plaintiff had previously disclosed all of the confidential information she contends was wrongfully disclosed by defendants, such information cannot support plaintiff's violation of privacy claims under the federal or state Constitution as it was no longer private at the time of defendants' disclosure.

Plaintiff argues that because an employee's personnel file at the place of employment is "within a zone of privacy," the fact that defendants disclosed information contained within her personnel file, without a search warrant or her consent, establishes a violation of her privacy rights under the federal and state Constitutions as a matter of law. Although a typical personnel file contains some confidential information, plaintiff cites no legal authority supporting the proposition that all information contained in a personnel file is confidential per se. Where, as here, an employee has voluntarily, knowingly, and publicly disclosed portions of her personnel file, the information contained within those portions is no longer confidential and cannot support a constitutional violation of privacy claim.

In her opening brief, plaintiff repeatedly refers to the criminal cases in which she was charged with forgery and the trial court suppressed the documents Mayfield obtained from the City on the ground they were illegally seized. To the extent plaintiff argues the trial court's evidentiary rulings on suppression motions in the criminal cases establish her privacy claims, her argument is meritless because evidentiary rulings under Penal Code section 1538.5 do not apply in a subsequent civil trial. (*Gikas v. Zolin* (1993) 6 Cal.4th 841, 859; *People v. Williams* (1979) 89 Cal.App.3d 1026, 1032 [a suppression order under section 1538.5 does not apply to a "subsequent civil trial or to a subsequent administrative hearing"].)

The trial court did not err by granting defendants' motion for summary judgment as to plaintiff's constitutional privacy claims.

III.
PLAINTIFF'S NEGLIGENCE CLAIM FAILS FOR THE SAME REASONS HER PRIVACY CLAIMS FAIL

In the first amended complaint, plaintiff's negligence claim was premised on defendants' breach of the duty not to disclose the same confidential information contained in her personnel file that served as the basis for her privacy claims. As discussed *ante*, the subject information was no longer confidential because it had been previously disclosed by plaintiff. The trial court properly granted summary judgment as to this claim, as well.

In the opening brief, plaintiff argues the City owed her the duty to notify her when any person was seeking to gain access to her personnel records under Code of Civil Procedure section 1985.6, subdivision (e), but did not do so before disclosing plaintiff's personnel records to Mayfield. Section 1985.6 sets forth procedures requiring a subpoenaing party in a civil action to provide notice to an employee whose employment records are being sought from an employer. The City did not provide plaintiff's personnel records to Mayfield in the context of civil litigation but in the context of a criminal investigation. Section 1985.6 is inapplicable to this case.

IV.
PLAINTIFF'S CLAIM FOR VIOLATION OF THE PHYSICIAN-PATIENT PRIVILEGE FAILS.

Plaintiff contends the trial court erred by granting summary judgment as to her claim defendants violated the physician-patient privilege codified at Evidence Code section 990 et seq. Section 994 provides that a patient "has a privilege to refuse to disclose, and to prevent another from disclosing, a confidential communication between patient and physician" if certain conditions are met. The phrase "confidential communication between patient and physician" is defined in section 992 as "information,

including information obtained by an examination of the patient, transmitted between a patient and his physician in the course of that relationship and in confidence by a means which, so far as the patient is aware, discloses the information to no third persons other than those who are present to further the interest of the patient in the consultation or those to whom disclosure is reasonably necessary for the transmission of the information or the accomplishment of the purpose for which the physician is consulted, and includes a diagnosis made and the advice given by the physician in the course of that relationship."

Evidence Code section 912, subdivision (a), provides that the "right of any person to claim a privilege provided by Section . . . 994 (physician-patient privilege), . . . is waived with respect to a communication protected by the privilege if any holder of the privilege, without coercion, has disclosed a *significant* part of the communication or has consented to disclosure made by anyone." (*Southern Cal. Gas Co. v. Public Utilities Com.* (1990) 50 Cal.3d 31, 46 ["revealing a significant part of the communication constitutes a waiver"].)

None of the information that plaintiff contends was wrongfully disclosed by defendants satisfies the definition of "confidential communication between patient and physician" under Evidence Code section 992 because (1) none reflects communications between plaintiff and a physician; and (2) as discussed in detail *ante*, the medical information contained in the documents had been publicly revealed by plaintiff before defendants disclosed it. The trial court did not err.

DISPOSITION

The judgment is affirmed. Respondent shall recover costs on appeal.

FYBEL, J.

WE CONCUR:

O'LEARY, ACTING P. J.

IKOLA, J.